82-1704

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LARRY BENNETT, JR., JOHN E. VICKERS, DR. MARION CARROLL, DR. THOMAS F. STATON, J. LOUIS WILKINSON, W. S. HAMNER, JOE OLIVER, JOE RAINES, and JUDSON C. LOCKE, JR.,

Petitioners,

v.

BOBBY WILLIAMS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES R. SEALE
THOMAS S. LAWSON, JR.
57 Adams Avenue
Montgomery, Alabama 36104
(205) 262-1671
Counsel for Petitioners.

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTIONS PRESENTED

I. Whether the defense of qualified immunity is unavailable as a matter of law to officials and employees of a state prison system previously found by a federal court to be unconstitutional until court-mandated broad scale standards have been fully implemented.

II. Whether the Court of Appeals erred in directing the trial court to permit the use of offensive collateral estoppel where conditions and facts addressed in the previous case were not proven to be in existence at the time of the incident in question, and the defendants were either not parties to, were unaware of, or did not have an opportunity to attack the previous findings.

III. Whether the trial court abused its discretion in instructing the jury that the state itself is not a party and cannot be held liable for damages when the given charge correctly stated the law and the instruction was precipitated by improper argument made by plaintiff's attorney during closing argument.

PARTIES

The parties to the appeal of this case before the Eleventh Circuit Court of Appeals were Larry Bennett, Jr., John E. Vickers, Dr. Marion Carroll, Dr. Thomas F. Staton, J. Louis Wilkinson, W.S. Hamner, Joe Oliver, John Chancery, Joe Raines, Larry Cook, Judson C. Locke, Jr., and State of Alabama Board of Corrections, Appellees, and Bobby Williams, Appellant.

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LARRY BENNETT, JR., JOHN E. VICKERS, DR. MARION CARROLL, DR. THOMAS F. STATON, J. LOUIS WILKINSON, W. S. HAMNER, JOE OLIVER, JOE RAINES, and JUDSON C. LOCKE, JR.,

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Petitioners Larry Bennett, Jr., John E. Vickers, Dr. Marion Carroll, Dr. Thomas F. Staton, J. Louis Wilkinson, W.S. Hamner, Joe Oliver, Joe Raines, and Judson C. Locke, Jr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding October 29, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Williams v. Bennett* at 689 F.2d 1370 (11th Cir. 1982), and a copy of said opinion appears in the Appendix hereto as Appendix A. No opinion was rendered by the United States District Court for the Middle District of Alabama.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on October 29, 1982. (Appendix B.) A timely petition for rehearing was filed and was denied on December 20, 1982, (Appendix C), however, due to a clerical error, defendants' counsel was not served with a copy of that order. The Court of Appeals for the Eleventh Circuit issued its mandate on January 14, 1983, but on motion of counsel on February 16, 1983, recalled and stayed the mandate to and including April 8, 1983. Pursuant to an application for extension of time filed by counsel for Petitioners herein, the United States Supreme Court granted an extension of time for filing the Petition for Writ of Certiorari until and including April 19, 1983, and this Petition is being filed within that time period.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Constitution of the United States, Amendment XI:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Constitution of the United States, Amendment XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code, Title 42:

§ 1983. *Civil action for deprivation of rights.*

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Code of Alabama 1975, § 41-9-74

"Board to pay judgments against board of corrections officials; limitations, exceptions, etc.

(a) As part of the consideration of the employment or appointment of the commissioner of the board of corrections, deputy commissioners of the board of corrections, members of the board of corrections and other officers, employees and agents of the board of corrections, whether part-time or full-time, the board of adjustment shall pay all final judgments awarded in courts of competent jurisdiction against the aforesaid commissioner, deputy commissioners, members of the board of corrections, officers, employees and agents, for acts arising out of and performed in connection with their official duties in behalf of the state of Alabama, except to the extent that such coverage may be provided by an insurance carrier.

(b) Payment shall be limited to a maximum of $100,000.00 for all claims arising out of the same act.

(c) No part of this section shall be admissible evidence in any court of law wherein any of the officers or persons indemnified herein are parties. Nothing in this section shall be deemed to waive the sovereign immunity of the state with respect to a claim covered under this section or to authorize the payment by the state of any judgment or settlement against the aforesaid commissioner, deputy commissioners, members of the board of corrections, officers, employees and agents, to the extent that the same exceeds the sum of $100,000.00.

(d) The provisions of this section shall not apply to the commissioner, any deputy commissioner, any member of the board of corrections and any other officer, employee and agent of the board of corrections who is

found guilty of gross negligence or intentional or knowingly unlawful behavior."

STATEMENT OF THE CASE

This suit arose from an incident between two inmates incarcerated in the population section of Holman Prison, Atmore, Alabama, on January 10, 1978. Prior to the date of this incident the United States District Court for the Middle District of Alabama had ordered broad prison reforms throughout the Alabama Prison System. *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976) (Appendix H), *aff'd with modifications sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977) (Appendix G), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978) (Appendix F). *Pugh*, *id.*, mandated that certain standards be met within the prison system to eliminate the deprivation of constitutional rights of the inmates it found to exist. It did not, however, require or expect immediate compliance and established procedures to stay abreast of the progress being made toward compliance.

Subsequent to the incident which was the basis of this litigation in the lower court, on the motion of the Governor of Alabama, Fob James, the Board of Corrections was disbanded and the prison system was placed in receivership, with Governor James named as receiver. (Opinion and Order establishing receiver is attached hereto as Appendix I.) Suit was brought pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, with jurisdiction of the district court invoked under 28 U.S.C. § 1331 and § 1343, against the individual petitioners herein and John Chancery, deceased, in both their individual and official capacities, and against the Alabama Board of Corrections and and Larry Cook. All of the facts material to the consid-

eration of the questions presented herein are stated in the opinion of the Eleventh Circuit in *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982), Appendix A hereto. All of the individuals sued in their official capacities were dismissed in their official capacities prior to the commencement of the trial, as was the Alabama Board of Corrections, and Larry Cook was dismissed during the trial for lack of jurisdiction over the claims alleged against him. Directed verdicts in favor of defendants Joe Raines and John Chancery were granted on December 8, 1980, and on that same date the jury returned a verdict for the remaining defendants. A corresponding judgment was subsequently entered. (Appendix E.)

Plaintiff-Appellant filed his appeal in the Circuit Court of Appeals for the Eleventh Circuit where, after the customary briefing, the case was orally argued. The Circuit Court reversed and remanded the case to the trial court for further proceedings consistent with its opinion. (Appendices A and B.) Although Defendants-Appellees petitioned the Court for a rehearing, the petition was denied on December 20, 1982. (Appendix C.) Because of a clerical error counsel for Defendants-Appellees were not informed of the denial and, indeed, were not aware of it until the Mandate issued on January 14, 1983. Subsequently, Defendants-Appellees moved the Court of Appeals to recall the Mandate and stay its issuance, and the Court did recall the mandate and stay its issuance to and including April 8, 1983. Upon application to the Supreme Court of the United States an extension of time was granted Petitioners for filing their Petition for Writ of Certiorari to and including April 19, 1983.

REASONS FOR GRANTING THE WRIT

This petition seeks review of an unprecedented Court of Appeals decision of major significance which greatly expands the personal liability of government officials and employees who continue to work for state agencies after those agencies have been found by federal courts to be in violation of the Eighth Amendment and ordered to undertake compliance with numerous standards established by those courts. The Court of Appeals held that the time set in a federal court's remedial order for compliance with its standards is immaterial, and, in a § 1983 action against such officials and employees, that the plaintiff need not prove any Eighth Amendment violation or proximate causation but that the trial court *must* direct a finding of cruel and unusual punishment as the proximate cause of the injury. It also held that the defendants in such a case cannot assert a qualified immunity or good faith defense. This shocking result, achieved through a reckless expansion of the use of offensive collateral estoppel, conflicts with prior decisions of this Court and is in conflict with decisions of other Courts of Appeal. Furthermore, this case does not present an isolated problem involving only these defendants, but, if allowed to stand, will adversely affect every other employee of a state prison or mental health system within the Eleventh Circuit which is operating under federal receiverships or federal court remedial orders—even those employees who have never been parties to any prior litigation or may have only recently been employed. It will also have an effect upon the states and their agencies as well, for many employees will be hesitant to remain in their jobs and bear such risks. The Eleventh Circuit's response to this has been to suggest that those officials and employees who do walk away might be guilty of callous indifference toward their charges and,

presumably, personally liable for so doing. Such employees face a situation that is intolerable and one which this Court cannot allow to continue.

I.

OFFENSIVE COLLATERAL ESTOPPEL

In the instant case, the United States Court of Appeals has held that the defendants in the court below were collaterally estopped to litigate the issue of whether a particular condition or practice in Holman Prison violated the plaintiff's Eighth Amendment right to be free from cruel and unusual punishment, because of a 1976 order which found the prison system as a whole to be constitutionally defective and directed that numerous changes be made in it over a period of time, including a change in the particular conditions in *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976), *aff'd with modification sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978). This holding which directs the trial court to permit the offensive use of collateral estoppel in this instance is in direct conflict with the decision of this Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). That case set forth the general conditions which permit the offensive use of collateral estoppel along with some, although not exhaustive, parameters for that application. In *Parklane Hosiery*, the Supreme Court found that while the *trial* court had wide discretion in permitting the offensive use of collateral estoppel, it should consider not only the possible negative effects on judicial economy related to not permitting its use but also the fairness to defendants in permitting its use thereby foreclosing relitigation of an issue, and it held that the party

against whom collateral estoppel would be offensively applied would have to have had a "full and fair" opportunity to litigate its claims in the prior action.

In order to avoid problems in the doctrine's use, the Supreme Court has been said to have adopted a general rule to guide the lower court:

> The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel. *Parklane Hosiery v. Shore*, 439 U.S. 322, at 331, 99 S.Ct. 645 at 651, 58 L.Ed. 552 (1979).

Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149 (5th Cir. 1982). Although citing *Parklane*, the Court of Appeals ignored the restrictions placed by this Court on the use of offensive collateral estoppel and even departed from its own prior application of *Parklane* expressed in *Hicks v. Quaker Oats Company*, 662 F.2d 1158 (5th Cir. Unit A 1981). There the same court that so recklessly orders the trial court in this case to permit the offensive use of collateral estoppel in the face of findings by the trial court that its use would be unfair to the defendants, recognized that its use should depend on the *fairness of applying the doctrine in the context of particular fact situations*. 662 F.2d 1158 at 1171. [Emphasis supplied.] See *Parklane*, at 330-331.

The particular fact situation in this case clearly shows the impropriety of the Court of Appeal's decision in reversing the action taken by the trial court. *Pugh* (the case whose judgment is said to estop the relitigation of the issue) and *Williams* are totally different. *Pugh* was a class action seeking injunctive relief related to conditions in the *entire* Alabama penal system, while *Williams* was a

damage suit brought by an individual plaintiff. *Pugh* found that unconstitutional conditions existed in 1976, while *Williams* involved an injury which occurred two years later—after significant court-monitored changes had been made in all phases of prison life. The parties to the cases were not identical. Those defendants in *Williams* who had been parties in *Pugh* were sued in different capacities in each case, and some of the defendants in *Williams*, while generally aware of *Pugh* decision, were not aware of its particular provisions and had had *no* opportunity to defend the *Pugh* case—having not been parties. *Pugh* dealt with prison conditions generally, while the particular condition complained of in *Williams* had not been litigated in *Pugh* but was one of numerous standards established by the trial court's remedial order. The Eleventh Circuit could not have departed more from *Parklane* and its own earlier decisions which established the accepted and prescribed manner in which offensive collateral estoppel may be applied.

The Eleventh Circuit decision also conflicts with the decisions of other Courts of Appeal. The Fifth Circuit in *Chemetron Corp. v. Business Funds, Inc.*, *supra*, decided only weeks before the Eleventh Circuit's decision in *Williams*, emphasized the importance of applying collateral estoppel only when such application was not unfair. However, the Court's application herein does not even pass that initial test of not being unfair and does not begin to approach the generally acceptable standards so eloquently expressed by the Seventh Circuit in *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982):

> In order to determine when a party may appropriately be precluded from relitigating an issue decided adversely to it in an earlier proceeding, a court must examine *whether the issue* on which collateral estop-

> pel is asserted *is identical* to that determined in a prior action; whether the controlling facts or legal principles have changed significantly since the prior judgment; and whether any special circumstances exist which would render preclusion inappropriate of unfair. [Citing *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1970). *See also: Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. 1981).]

These elements were carefully considered by the trial court below, but not by the Court of Appeals.

The Court of Appeals for the Second Circuit has noted that the requirements for the application of the doctrine of collateral estoppel include the identicalness of the issue in the subsequent case to that in the prior suit. *Rx Data Corp. v. Department of Social Services*, 684 F.2d 192 (2d Cir. 1982). The Court of Claims in reviewing the use of this doctrine in taxpayer suits has stated that, while the doctrine does have a viable economic benefit, it "should be carefully applied in order to insure that it does not work to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities . . . ." *McMullan v. United States*, 686 F.2d 915 (Ct.Cl. 1982). The Court of Appeals decision in this case will create such an inequity by accepting a general finding in *Pugh* as absolute in the face of uncontradicted evidence that substantial changes had been made in the penal system after that time.

Other Courts of Appeal have likewise held that the application of collateral estoppel is proper if limited to situations in which a matter raised in a second suit is identical in *all* respects with that decided in the first *and* if controlling facts and applicable legal rules remain un-

changed. *Powers v. United States*, 424 F.2d 593 (Ct.Cl. 1970); *Sydnes v. C.I.R.*, 647 F.2d 813 (8th Cir. 1981).

In *LaRocca v. Gold*, 662 F.2d 144 (2d Cir. 1981), it was held that two requirements must be met for a party to be precluded from relitigating an issue: ". . . first, the party must have had a full and fair opportunity to contest the decision said to be dispositive of the present controversy; second, the issue must be identical to the issue of the prior action." Similarly, the Court of Appeals for the Tenth Circuit has held that "in respect to . . . the doctrine of collateral estoppel . . . the issues and parties must be the same." In re *Johnson*, 518 F.2d 246 (10th Cir. 1975), *cert. denied sub nom. Clark v. Johnson*, 423 U.S. 893, 96 S.Ct. 191, 46 L.Ed.2d 125 (1975).

As shown by these decisions of other circuits, the Eleventh Circuit in *Williams* has departed from the criteria generally recognized in the application of offensive collateral estoppel. The writ should be granted in this case on the issue of offensive collateral estoppel not only because the Eleventh Circuit's decision conflicts with this Court's decision in *Parklane* and with decisions of other Courts of Appeal, but also because the decision below will have a direct and immediate impact on so many persons who are not parties—every employee of every prison system presently operating under federal court remedial orders. This Court must act to see that offensive collateral estoppel is applied according to the same criteria in all circuits and in strict compliance with this Court's opinions.

II.

DENIAL OF GOOD FAITH IMMUNITY

In *Harlow v. Fitzgerald*, U.S. , 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), this Court held that government officials performing discretionary functions generally are shielded from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 73 L.Ed.2d at 410. Under *Harlow*, a plaintiff must meet the burden by proving a violation of a clearly established constitutional right, by presenting evidence of the currently applicable law and that this law was clearly established at the time of the defendant's alleged wrongful action. *Harlow*, 73 L.Ed.2d at 410. The burden is upon the government official to raise the affirmative defense of qualified good-faith immunity. *Harlow*, 73 L.Ed.2d at 408.[1]

Following *Harlow*, the Eleventh Circuit Court of Appeals rendered three days apart two decisions on the qualified immunity issue, the present case, *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982) and *Espanola Way Corporation v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), both demonstrating the Eleventh Circuit's misinterpretation, if not total disregard, of the mandates of this Court in *Harlow*. The petition for certiorari should be granted in this case to correct the Eleventh Circuit's departure from the "objective test" set forth in *Harlow*.

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[1] In *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982), a ruling issued slightly less than three months after *Harlow v. Fitzgerald*, the Fifth Circuit specifically held that once the defendant has asserted the defense of qualified immunity, the burden shifts to the plaintiff to rebut the good faith defense by establishing that the defendant's wrongful conduct violated clearly established law.

In the present case, the Eleventh Circuit acknowledged the ruling in *Harlow* that under the objective test defendant government officials would be shielded from liability for civil damages if their conduct did not " 'violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Williams v. Bennett*, 689 F.2d at 1385 (quoting *Harlow*, 73 L.Ed.2d at 410). Yet the Eleventh Circuit ignores the pleading and proof requirements implicit in the *Harlow* decision. It did not question whether plaintiff's evidence had demonstrated that defendants violated a *clearly established* constitutional or statutory right; it did not question whether plaintiff had presented evidence of the currently applicable law giving him the rights he claims were violated; it did not question plaintiff's proof of whether the current law was clearly established at the time of his injury. Rather, the Eleventh Circuit simply held that because the earlier case of *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976), *aff'd with modifications sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978) had determined that the living conditions in Alabama prisons constituted cruel and unusual punishment, "defendants are precluded from now asserting that they should not have known that failure to meet the constitutional norms established in *Pugh* would violate Williams' constitutional rights." 689 F.2d at 1386. The *Pugh* order was broad-sweeping, directing changes in the entire Alabama prison system, not just within Holman prison, and it specifically contemplated that changes within the Alabama prison system would take a considerable period of time. At the time of plaintiff's injury, changes were being made in Alabama prisons, in an effort to comply with the *Pugh* order. Plaintiff did not prove that at that time he had a clearly established right to be

free from those conditions which defendants were in the process of improving in accordance with the Court's order and that defendants should reasonably have known of this right nor that the particular condition was of constitutional dimensions. While this Court has placed the burden on plaintiff to prove his clearly established constitutional or statutory right for the purpose of defeating defendants' qualified immunity defense, the Eleventh Circuit relieved the plaintiff of any proof requirements at all, allowing the broad order of *Pugh* to sweep away any chance defendants might have to protect themselves from civil damages by asserting their right to qualified immunity.[2]

The Eleventh Circuit's decision in *Williams* tends to deprive government officials of their recognized right to assert qualified immunity as an affirmative defense. The court spoke in terms of the determination in *Pugh* as "effectively preclud[ing] the defense" and of "precluding the *assertion* of a good faith defense." 689 F.2d at 1386 [*emphasis supplied*]. Yet this Court recognized as recently as *Harlow* the right of government officials in all cases *to at least assert* the qualified immunity defense for public policy reasons. 73 L.Ed.2d at 407.

The Eleventh Circuit issued a ruling similar to *Williams* on the qualified immunity issue in *Espanola Way Corp. v.*

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[2] The Eleventh Circuit relied upon the *Pugh* order, also, to hold that defendants were collaterally estopped to litigate the issue of the conditions in Holman Prison. It then "extend[ed] the preclusive effect of *Pugh* to the qualified immunity or good faith defense of the individual defendants." 689 F.2d at 1387. Clearly, the court was unjustified in extending the theory of collateral estoppel to the distinct and separate issue of defendants' qualified immunity, which has its own pleading and proof requirements as set forth by this Court in *Harlow*.

Meyerson, 690 F.2d 827 (11th Cir. 1982), reversing the trial court's granting of a summary judgment for the defendants in that §1983 action. The *Espanola Way* court cited significant portions of *Harlow* but ignored its pleading and proof requirement which must be met to resolve the threshold qualified immunity issue using *Harlow's* objective test. The Eleventh Circuit, as in *Williams*, neither analyzed the strength of the plaintiff's evidence, nor mentioned whether plaintiff had shown the violation by defendants of a clearly established constitutional or statutory right of plaintiff of which the defendants knew or reasonably should have known. Rather, in reversing, the court relied upon such factors as the allegations of malice made by plaintiff and the fact that, in the court's opinion, the factual record was slim. The Eleventh Circuit thus directly frustrates the aims of this Court in the *Harlow* decision that unsubstantiated allegations of malice not proceed to trial and that, in such cases, the factual record need not be increased through, for example, discovery. This Court has ruled in *Harlow* that if the threshold immunity issue is not determined by plaintiff's proving a clearly established constitutional or statutory right violated by defendants, the case should proceed no further and can be resolved on summary judgment. In *Espanola Way*, the Eleventh Circuit specifically takes issue with this ruling, stating that, "there is some question as to whether summary judgment may be an appropriate means of resolving a state of mind issue, at least in the absence of a hearing". 690 F.2d at 830-831.

By its decision in *Harlow*, this Court greatly limited what has been known as the subjective aspect of the qualified immunity issue.[3] In limiting the determination of a

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[3] Defendants' research has revealed that there is a conflict emerging among the Circuits as to whether *Harlow* completely eliminated

[footnote continued]

government official's right to rely upon his qualified immunity largely to the objective test set out in *Harlow*, the Court has greatly limited the ability of defendants to establish a strong case in their defense that they acted without malice toward the plaintiff. Because defendants' right to be protected by their qualified immunity now hinges on the objective test set up in *Harlow*, courts should be meticulous in their examination of plaintiff's pleadings and evidence to insure that he has established that defendants violated a clearly established constitutional or statutory right of plaintiff of which they knew or reasonably should have known. Because the Eleventh Circuit bypasses this proof requirement in *Harlow's* objective test by readily *assuming* a clearly established constitutional right by extending the theory of collateral estoppel, it has deprived defendants of even the chance of showing their entitlement to rely upon the affirmative defense of qualified immunity. This Court should grant Petitioners' Writ to correct this ruling by the Eleventh Circuit which conflicts with *Harlow v. Fitzgerald* and to resolve the conflicts among the circuits as to its correct

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the subjective prong of the qualified immunity issue or whether it just limited that prong. Holding that *Harlow* eliminated the subjective prong are *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982); *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982); and *Nakao v. Rushen*, 545 F. Supp. 1091 (N.D. Cal. 1982). Holding that *Harlow* merely limited the use of subjective analysis is *Albers v. Whitley*, 546 F. Supp. 726 (D.Or. 1982). The Eleventh Circuit in the present case acknowledges *Harlow* as causing "objective criteria now [to] govern the evaluation of a good faith defense," 689 F.2d at 1387, but then says that evidence will still be allowed as to the subjective intent of Defendants. Because of the confusion within the circuits as to the effect *Harlow* has had on the subjective component of the qualified immunity issue, the petition for writ of certiorari should be granted to give direction to the lower courts in this area.

interpretation. Unless reversed, the decision below will effectually deny the defense of qualified immunity to a large class of state officials and employees of prison and mental health systems which are presently operating under federal court remedial orders.

III.

INSTRUCTION ON STATE'S LIABILITY FOR DAMAGES

In the case below, the Eleventh Circuit held that the trial court erred in instructing the jury that the State of Alabama could not be required to pay any part of a judgment against defendants, although it neither found that the trial court had abused its discretion nor ever discussed the relevance of the trial court's discretion in giving such an instruction as this Court has recognized. It is well recognized, however, that a trial judge does have wide discretion in determining the manner and the language he will use in instructing a jury. *Robert v. Conti Carriers & Terminals, Inc.*, 692 F.2d 22 (5th Cir. 1982); *Bergstrom v. Sambo's Restaurants, Inc.*, 687 F.2d 1250 (8th Cir. 1982); *Columbia Plaza Corp. v. Security National Bank*, 676 F.2d 780 (D.C.Cir. 1982); *Kramer v. Keys*, 643 F.2d 382 (5th Cir. 1981). It is equally well established that the Eleventh Circuit should not have reversed the district judge's instructions absent a finding that he had abused that discretion. *Becker v. State of Missouri Department of Social Services*, 689 F.2d 763 (8th Cir. 1982). *Accord: Excel Handbag Co., Inc. v. Edison Brothers Stores, Inc.*, 630 F.2d 379 (5th Cir. 1980); *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980); *Aetna State Bank v. Altheimer*, 430 F.2d 750 (7th Cir. 1970).

The Eleventh Circuit not only ignored the circumstances which prompted the trial court's instruction, it also intimated, erroneously, that the State of Alabama

might be required to pay such a judgment and cited a statute which obviously would have no application to a judgment against these defendants in this type of action. *Williams v. Bennett*, 689 F.2d 1370, 1391n. 21 (11th Cir. 1982).

The trial judge had on more than one occasion directed plaintiff's counsel not to include in his argument to the jury the issue of whether the state could be required to pay a judgment against defendants. The reasons for this direction by the trial judge were specifically noted by the Eleventh Circuit: the fact that the existence of a collateral source of revenue to pay a judgment has no bearing on the fault of defendants and the fact that the absence or presence of a collateral source could induce a jury to decide a case on improper grounds. 689 F.2d at 1391. However, plaintiff's counsel persisted in injecting a possible collateral source into the case by suggesting throughout his argument that a judgment against defendants would be paid by the state. It was because of the refusal of plaintiff's counsel to abide by the court's instructions that neither counsel refer to the collateral source issue that the district judge exercised his discretion in instructing the jury in such a manner as to correct the abuses of plaintiff's counsel and stated his reasons for doing so.

Other circuits recognize that a trial court has broad discretion to control and direct the conduct of plaintiff's counsel during the trial and to regulate the scope of his argument. *Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186 (4th Cir. 1982); *Redd v. Shell Oil Company*, 518 F.2d 311 (10th Cir. 1975); *Duncan v. St. Louis-San Francisco Railway Company*, 480 F.2d 79 (8th Cir. 1973); *Sepia Enterprises, Inc. v. City of Toledo*, 462 F.2d 1315 (6th Cir. 1972); *Waldron v. Hardwick*, 406 F.2d 86 (7th Cir. 1969). The Eleventh Circuit not only ignores the fact

that the district judge had this broad discretion in directing the conduct of counsel and in determining whether counsel's improper conduct has had a prejudicial effect, *Arnold v. Eastern Airlines, Inc.*, *supra*, but also made no finding that the district judge abused that broad discretion. In *Arnold*, the Court of Appeals for the Fourth Circuit held that in reviewing a trial judge's response to misconduct on the part of a party's counsel to determine whether that response constituted a prejudicial abuse of discretion, the appellate court must give "great deference for the superior vantage point of the trial judge and with a close eye to the particular context of the trial under review rather than to any general formulations of principle . . . ." 681 F.2d at 197.

In the present case, the Eleventh Circuit gave no deference whatsoever to the judgment and discretion exercised by the district judge. It simply opined that the instruction that the state could not be required to pay "*may* have created undue sympathy for defendants to the prejudice of *Williams*." 689 F.2d at 1391 [emphasis supplied]. It did not consider what effect the argument of plaintiff's counsel might have had upon the defendants in the absence of the corrective instruction.

The Eleventh Circuit's decision in regard to the action taken by the trial court is clearly in conflict with decisions of other circuits and the writ should be granted for that reason.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES R. SEALE

THOMAS S. LAWSON, JR.

Counsel for Petitioners.